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Supreme Court, U. S.
FILED
SEP 16 1974
MICHAEL RODAK, JR., CLERK

No. 73-1869

In the Supreme Court of the United States

OCTOBER TERM, 1974

PETER H. BEER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

GERALD W. JONES,
JAMES R. KIECKHEFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 374 F. Supp. 363.

JURISDICTION

The judgment of the district court (J.S. App. 73a-74a) was entered on March 15, 1974. A notice of appeal (J.S. App. 75a-76a) was filed on April 5, 1974, and the jurisdictional statement was filed on June 13, 1974. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

QUESTION PRESENTED

Whether the district court properly determined that appellants had failed to establish that the redistricting

of the City of New Orleans, Louisiana, for councilmanic elections will not have the effect of abridging the right to vote on account of race or color.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, in pertinent part provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in Section 1973b(a) [of this title] * * * are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *.

STATEMENT

The facts are set forth at length in the opinion of the district court (J.S. App. 3a-22a). We briefly summarize them here.

As of 1970, the population of the City of New Orleans was 593,471 persons, of whom 267,308 were black; registered voters in the City numbered 242,416, of whom 83,588 were black. White citizens thus comprised 55 percent of the population and 65.5 percent of the voters; black citizens made up the remaining 45 percent of the population and 34.5 percent of the electorate (J.S. App. 3a).

There are few racially intermixed residential areas in the city. The black population is heavily concentrated in a series of neighborhoods extending eastwardly and westwardly through the central part of the city; the areas lying north and south of this belt, with minor exceptions, are overwhelmingly white (J.S. App. 4a).

The City Council of New Orleans is composed of seven members, of whom five are chosen from single-member districts and the remaining two from the city at large. Primary elections for the Council are by majority vote, and singleshot voting is prohibited (*ibid.*).

The City Charter of New Orleans requires the Council, after each national decennial census, to reapportion the five districts so that each is of equal population. Acting pursuant to that requirement, the Council, on March 2, 1972, enacted a new reapportionment scheme, Ordinance No. 4796 M.C.S. (Plan I). The City Attorney submitted Plan I to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Plan I created five councilmanic districts, each running from north to south across the city; the effect of this redistricting was to divide the black population among the five districts in such a manner that each district contained more white than black voters. The Attorney General interposed an objection to that plan (J.S. App. 7a-8a, n. 26):

> * * * Our analysis shows that the district boundary lines in the submitted plan are drawn in a manner which appears to dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts. Moreover, it does not appear that the district lines

> are drawn as they are because of any compelling governmental need and they do not reflect numeric population configurations or considerations of district compactness or regularity of shape. * * *

The Council subsequently passed a second reapportionment plan, Ordinance No. 5154 M.C.S. (Plan II). Plan II differed from Plan I in only a single essential respect: the predominantly white community of Algiers—an area isolated from the rest of the city by the Mississippi River—was made a single district, and the other four districts ran from north to south as in Plan I. The effect of this change was, however, to give black voters a slight majority (52 percent) in one district. The City Attorney submitted Plan II to the Attorney General, who objected to that plan also (J.S. App. 9a-10a, n. 33):

> Our evaluation of Ordinance numbers 4796 and 5154 indicates that the objectionable dilution of black voting strength in both redistricting plans is primarily attributable to the vertical [*i.e.*, north-south] shape of the submitted districts. Because the predominantly black neighborhoods in the city are located generally in an east to west progression, the vertical districts in the submitted plans divided the black neighborhoods and combined them with white areas in the north and the south of the city resulting in districts with more white than black voters.

Six members of the Council then filed this action in the United States District Court for the District of Columbia, requesting a declaratory judgment under Section 5 of the Voting Rights Act that Plan II neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. The district court denied the requested declaratory relief.

The court found that Plan II would have the effect of abridging the vote of the black citizenry of New Orleans. The court based that determination principally upon the observation that the proposed redistricting, considered together with the at-large election of two councilmen, the requirement of a majority vote for primary nomination and the prohibition against singleshot voting in the at-large election, virtually guaranteed that white voters would control at least six of the seven council seats. The court did not consider this fact to be conclusive of illegality under the Voting Rights Act, but it stated that the City had the burden of coming forward with substantial reasons to justify its selection of a redistricting plan that diluted black voting strength in councilmanic elections. The court reviewed the City's claims and concluded that the City had failed to carry that burden.

ARGUMENT

1. Appellants contend (J.S. 8-11) that the district court erroneously applied a test of "compelling state interest" (J.S. 9) to their proffered justifications for selecting a redistricting plan that politically fragmented the black population of New Orleans. But the court, in rejecting appellants' justifications, did not rely on one precise test. The court reasoned that since feasible redistricting alternatives existed that would not have a comparable discriminatory effect, and appellants had offered no substantial justification for "dilution of the vote * * * on the scale indicated here" (J.S. App. 53a), Plan II did not satisfy the requirements of the Voting Rights Act. That conclusion was correct. State and local governments bear the burden of proving substantial justification for the choice of a plan with a racially discriminatory effect. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *Loving* v. *Virginia*, 388 U.S. 1. No such justification was offered here.

2. Appellants also contend (J.S. 11-12) that Plan II does not abridge the voting rights of black citizens. At the core of this contention is appellants' view that abridgment of voting rights occurs only "when the black minority is denied meaningful access to the political process" (J.S. 11). That is not the law. Abridgment or dilution of voting rights occurs when a group of voters is denied full, fair, and equal access to the political process. See, *e.g., Reynolds* v. *Sims,* 377 U.S. 533.

Appellants bore the burden of showing that Plan II would not abridge the right of black citizens to vote. *Georgia* v. *United States,* 411 U.S. 526. The district court, after carefully reviewing Plan II in its historical and political context, found that as a practical matter the plan ensured that whites, representing only 65 percent of total registered voters, would control at least 86 percent of the council seats (six seats out of seven). The court properly determined that that result accomplished a substantial dilution of the voting rights of black voters.

3. Appellants further contend (J.S. 12-13) that the district court erred in considering the impact of the at-large councilmanic elections when evaluating the dilutive effect of Plan II. We believe the district court acted properly in considering all aspects of the City's councilmanic election scheme in passing upon the effect of the redistricting proposal before it. The dilutive effect of Plan II cannot be understood in a vacuum; the fact that two at-large council seats will inevitably be controlled by whites bears upon the question whether Plan II will have the effect of denying black voters full, fair, and equal participation in the selection of council members.

In any event, even ignoring the at-large seats, Plan II has the practical effect of ensuring white control of at

least 80 percent of the single-member district seats on the Council (four seats out of five) and thus substantially curtails the effectiveness of the black vote. This is the necessary result of the Council's insistence upon north-south redistricting (J.S. App. 38a):

> When the five councilmanic districts are constructed vertically—by dividing lines drawn northwardly and southwardly across the entire city—it is difficult to avoid the result that each district will combine a segment of the east-west black belt with segments of contiguous white areas. Rather, the likely result is all or nearly all districts with a preponderance of white inhabitants and voters. * * *

Other redistricting schemes are feasible (see J.S. App. 53a) and a less discriminatory one should be chosen.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

GERALD W. JONES,
JAMES R. KIECKHEFER,
Attorneys.

SEPTEMBER 1974.

DOJ-1974-09